

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL PATRICK WHALEN,

Defendant.

Case No.: 13-CR-697-GPC

**ORDER DENYING MOTION FOR  
REDUCTION OF SENTENCE**

[ECF No. 59]

**I. INTRODUCTION**

On October 11, 2013, Michael Patrick Whalen (“Defendant”) was sentenced to a custodial term of 140 months for convictions for possession with intent to distribute methamphetamine and being a felon in possession of firearms and ammunition. (ECF No. 57.) Defendant originally received a downward departure based on mitigating circumstances (§ 5K2.0). In 2014, the United States Sentencing Commission promulgated Amendment 782 (“Drugs Minus 2”), which, effective November 1, 2014, lowered the base offense levels for most drug quantities in USSG § 2D1.1(c), and made this change retroactive via Amendment 788. *See also* USSG § 1B1.10(c).

On April 2, 2015, Defendant, proceeding pro se, filed a Motion for Appointment of

1 Counsel to aid him in filing a Motion for Reduction of Sentence under 18 U.S.C. § 3582(c).  
 2 (ECF No. 59.) On April 3, 2015, the Court provisionally appointed Federal Defenders of  
 3 San Diego, Inc. (“FDSDI”) to represent Defendant. (ECF No. 60.) FDSDI did not  
 4 subsequently file a motion for reduction of sentence. Given this set of circumstances, the  
 5 Court will construe Defendant’s Motion for Appointment of Counsel as a Motion for  
 6 Reduction of Sentence.

7 Finding that Defendant’s current sentence is below the low-end of the amended  
 8 guideline range, the Court **DENIES** Defendant’s Motion for Reduction of Sentence.

## 9 **II. DISCUSSION**

### 10 **A. Modification of Sentence Under 18 U.S.C. § 3582(c)**

11 Generally, a federal court “may not modify a term of imprisonment once it has been  
 12 imposed.” 18 U.S.C. § 3582(c). An exception to that rule lies “in the case of a defendant  
 13 who has been sentenced to a term of imprisonment based on a sentencing range that has  
 14 subsequently been lowered by the Sentencing Commission.” § 3582(c)(2). When the  
 15 Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2)  
 16 authorizes a district court to reduce an otherwise final sentence that is based on the  
 17 amended provision. Any reduction must be consistent with applicable policy statements  
 18 issued by the Sentencing Commission. *Id.*

19 Amendment 782 to the United States Sentencing Guidelines, effective November 1,  
 20 2014, lowered the penalties for most drug offenses by reducing the offense level in the  
 21 § 2D1.1 Drug Quantity Table by two levels. In Amendment 788, the Sentencing  
 22 Commission decreed that Amendment 782 may be applied retroactively to lower the  
 23 sentences of previously sentenced inmates.

24 In *Dillon v. United States*, 560 U.S. 817, 826-27 (2010), the Supreme Court set forth  
 25 a two-step inquiry for assessing a motion for reduction of sentence under § 3582(c). *Id.*

26 At step one, § 3582(c)(2) requires the court to follow the Commission’s

1 instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence  
 2 modification and the extent of the reduction authorized. Specifically,  
 3 § 1B1.10(b)(1) requires the court to begin by "determin[ing] the amended  
 4 guideline range that would have been applicable to the defendant" had the  
 5 relevant amendment been in effect at the time of the initial sentencing. "In  
 6 making such determination, the court shall substitute only the amendments  
 7 listed in subsection (c) for the corresponding guideline provisions that were  
 8 applied when the defendant was sentenced and shall leave all other guideline  
 9 application decisions unaffected."

10 \* \* \* \* \*

11 At step two of the inquiry, § 3582(c)(2) instructs a court to consider any  
 12 applicable § 3553(a) factors and determine whether, in its discretion, the  
 13 reduction authorized by reference to the policies relevant at step one is  
 14 warranted in whole or in part under the particular circumstances of the case.

## 15 **B. Determination of Amended Guideline Range**

16 Under § 1B1.10, a defendant is eligible for a sentencing modification when an  
 17 amendment listed in § 1B1.10(d) lowers "the guideline range that corresponds to the  
 18 offense level and criminal history category determined pursuant to § 1B1.1(a), which is  
 19 determined before consideration of any departure provision in the Guidelines Manual or  
 20 any variance." USSG § 1B1.10 n.1(A). Section 1B1.10(b)(2) confines the extent of the  
 21 reduction authorized. Once the Court determines the amended guideline range, it "shall  
 22 not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum  
 23 of the amended guideline range." *Id.* § 1B1.10(b)(2)(A). The only exception to this  
 24 prohibition applies if the defendant previously received a downward departure "pursuant  
 25 to a government motion to reflect the defendant's substantial assistance to authorities." In  
 26 that case, the Court may apply "a reduction comparably less than the amended guideline  
 27 range." *Id.* § 1B1.10(b)(2)(B).

28 As Amendment 782 is listed in § 1B1.10(d), the Court must determine the "amended  
 29 guideline range" that would have been applicable to the defendant had Amendment 782  
 30

1 been in effect at the time of the sentence. USSG § 1B1.10(b)(1). Determination of the  
 2 “amended guideline range” is at the heart of the disagreement between the parties in this  
 3 case. Defendant has calculated the “amended guideline range” by including a reduction for  
 4 mitigating circumstances.

5 Defendant’s position is premised on a version of § 1B1.10 that was in effect prior to  
 6 November 1, 2011. It provided that, if the defendant originally received a below-  
 7 Guidelines departure or variance, a comparable departure “may be appropriate” when  
 8 granting a sentence reduction under § 3582(c)(2), while a comparable variance “generally  
 9 would not be appropriate.” *See USSG § 1B1.10(b)(2)(B) (2010).* As of November 1, 2011,  
 10 the Sentencing Commission amended § 1B1.10 so that only a defendant who previously  
 11 received a downward departure based on cooperation can obtain a reduction below the  
 12 amended guideline range. (ECF No. 46 at 5.) The Commission imposed a “single  
 13 limitation applicable to both departures and variances” in order to “avoid unwarranted  
 14 sentencing disparities” and “undue complexity and litigation.” *See Notice of Final Action*  
 15 *Regarding Amendment to Policy Statement 1B1.10*, 76 Fed. Reg. 41332, 41332, 41334  
 16 (July 13, 2011).

17 Note 1(A) to § 1B1.10 specifically states that the amended guideline range “is  
 18 determined before consideration of any departure provision in the Guidelines Manual or  
 19 any variance.” § 1B1.10 n.1(A) (emphasis added). A commentary provision—such as  
 20 Application Note 1, “which functions to interpret a guideline or explain how it is to be  
 21 applied”—is binding as long as the Commentary does not conflict with the Constitution, a  
 22 federal statute, or the guideline at issue. *Stinson v. United States*, 508 U.S. 36, 42-43 (1993)  
 23 (internal quotation marks and alterations omitted). Thus, the Court may not factor in a  
 24 “fast-track” or any other departure into the amended guideline range unless an exception  
 25 exists.

26 The exception to this rule is found in § 1B1.10(b)(2)(B). Under § 1B1.10(b)(2)(B),  
 27  
 28

1 reductions “comparably less than the amended guideline range” are permitted only in cases  
 2 where the original term of imprisonment was below the applicable guideline range  
 3 “pursuant to a government motion to reflect the defendant’s substantial assistance to  
 4 authorities.” *Id.* § 1B1.10(b)(2)(B). Every circuit court that has addressed the issue agrees  
 5 that § 1B1.10(b)(2)(B) bars a district court from lowering a defendant’s below-guideline  
 6 sentence unless the departure at his original sentencing was based on his substantial  
 7 assistance to the government. *See United States v. Berberena*, 694 F.3d 514, 518-19 (3d  
 8 Cir. 2012); *United States v. Anderson*, 686 F.3d 585, 588 (8th Cir. 2012); *United States v.*  
 9 *Glover*, 686 F.3d 1203, 1207 (11th Cir. 2012); *accord United States v. Colon*, 707 F.3d  
 10 1255, 1258 (11th Cir. 2013); *United States v. Lizalde*, 502 Fed. Appx. 655, 657 (9th Cir.  
 11 2012) (unpublished); *United States v. Beserra*, 466 Fed. Appx. 548, 550 (7th Cir. 2012)  
 12 (unpublished).

13 A motion for downward departure based on mitigating circumstances is not a motion  
 14 for substantial assistance. Unlike a substantial assistance motion, it does not require  
 15 “substantial assistance in the investigation or prosecution of another person.” In addition,  
 16 Note 3 to § 1B1.10 omits a § 5K2.0 motion as one for substantial assistance. Note 3  
 17 specifically provides that “[t]he provisions authorizing such a government motion are  
 18 § 5K1.1; (2) 18 U.S.C. § 3553(e); and (3) Fed R. Crim. P. 35(b).” *Id.* n.3. Further, a  
 19 defendant’s “amended guideline range” does not incorporate previously granted variances  
 20 pursuant to 18 U.S.C. § 3553(a)(1) as they also do not qualify as “substantial assistance  
 21 departures.”

22 Ultimately, the Commission decided to impose a “single limitation applicable to  
 23 both departures and variances” in order to “avoid unwarranted sentencing disparities” and  
 24 “undue complexity and litigation.” *Hogan*, 722 F.3d at 61. This decision limits the number  
 25 of defendants who will be able to obtain relief under § 3582(c)(2) in light of the guideline  
 26 amendments. The First Circuit has commented that they are “troubled by the extent to

1 which the amended policy statement and Application Notes severely limit the number of  
2 defendants . . . who will be able to obtain relief” but recognize that “in these instances the  
3 district court’s hands [are] tied.” *Id.* at 63.

4 The present case involved possession with intent to distribute 1.25 kilograms of  
5 methamphetamine (actual). Under the guidelines in effect at the time of sentencing and  
6 the terms of the plea agreement, the base offense level was level 34. The Court increased  
7 the guidelines by 1 level for the other count of being a felon in possession of firearms and  
8 ammunition, and reduced the guidelines by 3 levels for acceptance of responsibility (§  
9 3E1.1(b)). The Court found that the adjusted offense level was 32, the Criminal History  
10 Category was VI, and the applicable guideline range was 210-262 months. The Court then  
11 departed 4 levels for mitigating circumstances (§ 5K2.0) and sentenced the Defendant to  
12 140 months.

13 Applying the amended base offense level provided by Amendment 782, and taking  
14 into account the 2 level reduction adopted from the plea agreement, the base offense level  
15 is 32. Leaving all other guideline application decisions unaffected and removing departures  
16 and variances results in an increase of 1 level for the combined offense and a reduction by  
17 3 levels for acceptance of responsibility (§ 3E1.1(b)). The adjusted offense level is 30, the  
18 Criminal History Category is VI and the applicable guideline range is 168-210 months. In  
19 the instant case, Defendant received a below-guideline sentence based on mitigating  
20 circumstances, not substantial assistance to the government. To obtain relief under §  
21 3582(c), the guideline amendments at issue must “lower[]” a defendant’s applicable  
22 guideline range. U.S.S.G. § 1B1.10(a)(2)(B) (“A reduction in [a] defendant’s term of  
23 imprisonment is not consistent with this policy statement and therefore is not authorized  
24 under 18 U.S.C. § 3582(c)(2) if . . . [the amendment] does not have the effect of lowering  
25 the defendant’s applicable guideline range”). Here, they do not. Defendant’s amended  
26 guideline range is 168 to 210 months and Defendant received a below-guideline sentence

1 of 140 months. Since the lower limits of the amended guideline range is higher than the  
2 original sentence, Defendant is ineligible for modification of their sentence.

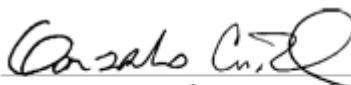
3 Accordingly, the Court **DENIES** Defendant's motion for a sentence reduction under  
4 18 U.S.C. § 3582(c)(2).

5 **III. CONCLUSION AND ORDER**

6 Based on the reasons stated above, Defendant's Motion for Reduction of Sentence  
7 (ECF No. 59) is **DENIED**.

8 **IT IS SO ORDERED.**

9 Dated: November 2, 2015

  
10 Hon. Gonzalo P. Curiel  
11 United States District Judge